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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re the Application of)
JEFFERY SCOTT) File No. BPH-910213ME
For Construction Permit for)
new FM station on Channel 278)
at Bethany Beach, Delaware)

To: Chief, Mass Media Bureau

OPPOSITION TO PETITION FOR LEAVE TO AMEND

EICHER COMMUNICATIONS, INC. ("Eicher"), pursuant to Section 1.45(a) of the Commission's Rules,^{1/} hereby opposes the "Petition for Leave to Amend," filed July 2, 1991 by Jeffery Scott ("Scott").^{2/} Scott has failed to demonstrate "good cause" for acceptance of the amendment.

1. Section 73.3522(a)(6) of the Commission's Rules provides that amendments to pending FM applications which have been accepted for tender and filing can be amended prior to designation for hearing "only upon a showing of good cause for late filing..." 47 C.F.R. §73.3522(a)(6). Such a showing of "good cause" requires that an applicant demonstrate, inter alia, that (1) it has acted with due diligence and (2) that the proposed amendment was not required by the voluntary act of the applicant. See generally, Erwin O'Conner Broadcasting Company, 22 FCC 2d 140, 143 (Rev. Bd. 1970).

^{1/} 47 C.F.R. §1.45(a).

^{2/} Eicher's Opposition is timely filed. 47 C.F.R. §§1.4(b); 1.45(b).

2. "Due diligence" has been held to date "from 'the time the applicant is, or should have been, apprised of the problem requiring amendment.'" Texas Communications Limited Partnership, 5 FCC Rcd 5876 (¶ 3) (Rev. Bd. 1990) (subsequent history omitted), citing Brownfield Broadcasting Corp., 88 FCC 2d 1054, 1058 (1982). Notice of and compliance with the Commission's engineering rules must be calculated in the due diligence analysis. Royce International Broadcasting Company v. F.C.C., 820 F.2d 1332 (D.C. Cir. 1987). FCC Form 301's "General Instructions," Item B, specifically puts applicants on notice that they should have on hand and be familiar with Part 73 of the Commission's Rules. To the extent that an error in interpretation of the Rules is by an applicant's consulting engineer, such a defect in the application is still chargeable to the applicant. Texas Communications, supra, 5 FCC Rcd at 5877 (¶ 6); R.A.D. Broadcasting Corporation, 4 FCC Rcd 4772 (1989), appeal dismissed, No. 89-1413 (D.C. Cir. Feb. 27, 1990). Thus, Scott must be charged with knowing of the need to comply with the minimum distance separation under Section 73.207 as of the filing of his application.

3. Scott contends that the need for the amendment "results from the Commission's modification of its Rules -- something that was clearly not Scott's voluntary act." (Petition, p. 3). Further, Scott contends that in all other respects, it has met the "good cause" test, including the requirement to act diligently. (Petition, p. 3, fn. 2).

4. The amendment is not required, as Scott would have it, by the act of the Commission in somehow "modifying" its engineering rules, specifically Section 73.213(c). As Eicher has definitively demonstrated, see, "Petition to Dismiss or Deny," filed June 17, 1991, and "Reply to Opposition to Petition to Deny," filed July 15, 1991, the Commission has not "modified" Section 73.213(c). Applicants for stations for new allotments made in response to Petitions to Amend the FM Table of Assignments filed after October 2, 1989 were required to meet the mileage separations set forth in Section 73.207, except for those stations "grandfathered" to the new allotment. (Eicher Reply, p. 6).^{3/} Thus, the amendment was not involuntary, as contended by Scott. The amendment resulted from Scott's misreading of the Commission's Rules, not from a change in the Commission's Rules.

^{3/} In its Memorandum Opinion and Order in MM Docket No. 88-375, FCC 91-128, released May 30, 1991, at footnote 7 of the MO&O, the Commission stated the following:

"^{7/} In a connected matter, we wish to clarify our policy regarding applications for construction permits filed to implement allotments resulting from petitions for rulemaking to amend the Table of FM Allotments filed prior to October 2, 1989 (the effective date of the new Class A spacing requirements). Such applications must meet the new spacing requirements with respect to all facilities and allotments except those to which the allotment reference coordinates were short-spaced on the effective date of the allotment. In addition, such applications must meet the new spacing requirements with respect to all pending applications that are fully spaced to the reference point for the new allotment."

(Emphasis supplied). The MO&O merely clarified, not modified, what had been its policy all along regarding processing of applications under Section 73.213(c).

5. The Commission requirement for a minimum separation of 178 kilometers between co-channel WGMS, Washington, D.C. and the new Bethany Beach station on Channel 278 was in effect when Scott filed his application.^{4/} Scott must be charged with knowledge of that requirement as of the time that he filed his application. His May 16, 1991 amendment, which failed to take account of the minimum separation of 178 kilometers, might have been timely filed by Scott but was still a defective amendment. Scott should have known the correct interpretation of the Commission's Rules.

6. Scott has failed to either show that he acted diligently to correct the defect in his application or that the amendment was not required by his voluntary act. Scott has not demonstrated "good cause."

^{4/} Interestingly, co-channel WGMS does not even appear on Scott's "FM Spacing Study," Exhibit V-B-1(a) of his original application.

WHEREFORE, in light of the foregoing, Eicher respectfully requests that the Commission deny Scott's July 2, 1991 "Petition for Leave to Amend."

Respectfully submitted,

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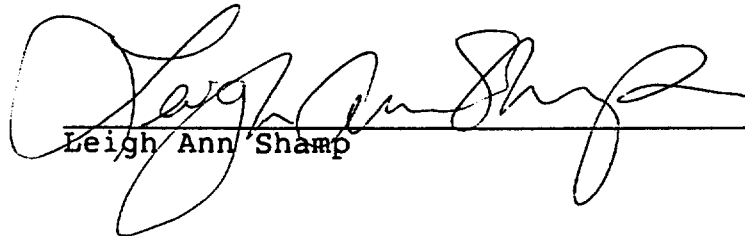
Its Counsel

Dated: July 17, 1991
0745/petamend.opp

CERTIFICATE OF SERVICE

I, Leigh Ann Shamp, a secretary in the law firm of Besozzi & Gavin, do hereby certify that I have, on this 17th day of July, 1991, sent the foregoing "OPPOSITION TO PETITION FOR LEAVE TO AMEND" by U.S. mail, first class, postage-prepaid, to the following:

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